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f/k/a THE BILLING RESOURCE, dba
8 INTEGRETTEL

9 UNITED STATES BANKRUPTCY COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 [SAN JOSE DIVISION]

12 In re

Case No. 07-052890

13 OLD T.B.R., INCORPORATED, f/k/a THE
14 BILLING RESOURCE, dba INTEGRETTEL,
Debtor.

Chapter 11

15 Tax ID: 33-0289863

17 OLD T.B.R., INCORPORATED, f/k/a THE
18 BILLING RESOURCE, dba INTEGRETTEL,

Adv. Proc. No. 09-05074

19 Plaintiff,

**FIRST AMENDED COMPLAINT FOR
DECLARATORY RELIEF, SPECIFIC
PERFORMANCE AND BREACH OF
CONTRACT**

20 v.

21 THE BILLING RESOURCE, LLC, a Delaware
limited liability company,

22 Defendant.
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1 Old T.B.R., Incorporated, f/k/a The Billing Resource, dba Integretel, a California
2 corporation, plaintiff herein (the "Debtor"), alleges as follows:

3 1. This is an adversary proceeding seeking declaratory and injunctive relief pursuant
4 to 28 U.S.C. Sections 1334(b) and (e), 2201 and 2202; 11 U.S.C. §§ 105 and 541; and
5 Fed.R.Bankr.P. 7001(7) and (9).

6 THE PARTIES

7 2. The Debtor is a corporation organized and existing under the laws of the State of
8 California. The Debtor is the debtor and debtor in possession in the above-referenced chapter 11
9 bankruptcy case of Old T.B.R., Incorporated, No. 07-52890 (the "Bankruptcy Case"), to which
10 this adversary proceeding "relates" pursuant to Federal Rule of Bankruptcy Procedure 7008(a).
11 The Debtor commenced this Bankruptcy Case by filing a voluntary petition under chapter 11 of
12 the United States Code (i.e., the "Bankruptcy Code") on September 16, 2007 (the "Petition Date").
13 The Bankruptcy Case is pending in the United States Bankruptcy Court for the Northern District
14 of California, San Jose Division.

15 3. Defendant The Billing Resource, LLC ("New TBR") is a Delaware limited liability
16 company. New TBR purchased the operating assets of the Debtor in a transaction approved by
17 this Court in an order entered on October 16, 2008 ("Sale Order") pursuant to an Asset Purchase
18 Agreement and related agreements. The Sale Order provided that this Court would have exclusive
19 jurisdiction over, *inter alia*, actions relating to the sale or its implementation. As part of the sale,
20 New TBR and the Debtor's subsidiary, PaymentOne Corporation ("PaymentOne") entered into the
21 PaymentOne Shared and Support Services Agreement ("SSSA") which provides that any dispute
22 arising under or related to this agreement in which the Debtor is a party shall be brought in the
23 Bankruptcy Court. Also as part of the Sale, New TBR and the Debtor entered into a Master
24 Services Agreement ("MSA"), which also provides that any dispute arising in connection with the
25 agreement shall be brought exclusively in the Bankruptcy Court.

26 JURISDICTION AND VENUE

27 4. This adversary proceeding arises under title 11, or arises in or is related to the
28 Bankruptcy Case, within the meaning of 28 U.S.C. Section 1334(b). This Court therefore has

1 jurisdiction over this adversary proceeding pursuant to 28 U.S.C. Sections 157(a), 157(b), 1334(b)
2 and 1334(e) and Rule 5011-1 of the Bankruptcy Local Rules of the United States District Court
3 for the Northern District of California.

4 5. This Court also has jurisdiction pursuant to 28 U.S.C. Sections 2201 and 2202.

5 6. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. Sections
6 157(b)(2)(A), (N) and (O).

7 7. Venue is proper in this district pursuant to 28 U.S.C. Section 1409(a).

8 8. New TBR is subject to the jurisdiction of this Court.

9 **GENERAL FACTUAL ALLEGATIONS**

10 9. On October 31, 2008, the Debtor closed the sale of its operating assets to New TBR
11 under the Asset Purchase Agreement and related agreements. As part of this sale, New TBR and
12 the Debtor agreed that an existing agreement between the Debtor and PaymentOne Corporation
13 ("PaymentOne"), the Agreement for Data Processing Services dated as of March 1, 2006 (the
14 "Data Processing Agreement"), would be assigned by the Debtor to New TBR and assumed by
15 New TBR. PaymentOne and New TBR also entered into their own agreement as of the time of the
16 operating assets sale, the SSSA, which modified certain provisions of the Data Processing
17 Agreement. The Data Processing Agreement provides for New TBR to obtain specified inquiry
18 services from PaymentOne so that New TBR could fulfill obligations it had to its customers,
19 including that PaymentOne would furnish toll-free telephone lines ("800 Numbers") for this
20 purpose, and that New TBR would pay specified charges for those services.

21 10. PaymentOne has performed the services required of it under the Data Processing
22 Agreement, including by providing the 800 Numbers needed for New TBR customers to obtain
23 inquiry services. New TBR has now asserted that the 800 Numbers provided under the Data
24 Processing Agreement by PaymentOne in fact belonged to the Debtor and should have been
25 transferred to New TBR as part of the sale of the operating assets. The Debtor and PaymentOne
26 dispute this contention and contend that New TBR's only rights to the 800 Numbers arise from the
27 contracted services provided to New TBR under the Data Processing Agreement.

1 11. Under the MSA that was also entered into in connection with the sale of Old TBR's
2 operating assets, New TBR undertook obligations to receive money for the benefit of Old TBR
3 and its customers, and to provide "PhoneBill Services" pursuant to the provisions of Schedule II
4 of the MSA.

5 12. As part of the PhoneBill Services provided by New TBR, New TBR is required to
6 process amounts charged back by the LECs against the monies previously received by New TBR
7 for the billing transactions submitted to the LECs. In the ordinary course, customers receive funds
8 on account of their billing transactions, but then have future receipts reduced by the amount of
9 these chargebacks. Under the MSA, the Debtor and New TBR agreed that New TBR would
10 withhold the chargebacks from amounts otherwise paid to the Debtor's customers. They further
11 agreed that if the calculation of proceeds less chargebacks for an individual customer resulted in a
12 negative amount, then the Debtor would be responsible for paying an invoice for this amount
13 submitted by New TBR.

14 13. The Debtor is informed and believes and thereon alleges that New TBR has failed
15 to reduce the monies otherwise payable to the Debtor's customers by the chargeback amounts
16 withheld by the LECs. Instead, New TBR asserts that all of the chargeback amounts are payable
17 by the Debtor and that the Debtor itself must seek recourse against its former customers to the
18 extent that it does not have sufficient reserves from the customers. New TBR has sent invoices to
19 the Debtor in amounts totaling in excess of \$2.8 million on account of these chargebacks and
20 threatened to commence litigation to collect on the invoices.

21 14. In order to determine the amount of any of its obligations to New TBR,
22 representatives of the Debtor's estate have requested pursuant to applicable provisions of the MSA
23 that New TBR furnish the information they believe necessary to review the accuracy of the
24 invoices and New TBR's compliance with the provisions of the MSA. New TBR has failed to
25 comply fully with these requests but has continued to assert that it has unpaid administrative
26 claims against the Debtor's estate.

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1 **FIRST CLAIM FOR RELIEF**

2 **(Declaratory Relief Pursuant To 28 U.S.C. Sections 2201 and 2202; 11 U.S.C. Section 105;**
3 **Rules 7001(7) and (9) of the Federal Rules of Bankruptcy Procedure)**

4 15. The Debtor repeats the allegations set forth in Paragraphs 1 through 14 as if fully
5 set forth herein.

6 16. This is a claim for declaratory relief brought under the provisions of 28 U.S.C.
7 Sections 2201 and 2202; 11 U.S.C. Section 105; and Rules 7001(7) & (9) of the Federal Rules of
8 Bankruptcy Procedure.

9 17. An actual controversy has arisen and now exists between the Debtor and New TBR
10 relating to their legal rights and duties for which the Debtor seeks a judicial declaration of rights as
11 to such matters, as well as further necessary or proper relief, including injunctive relief.

12 18. A declaratory judgment is necessary and appropriate at this time in that the Debtor
13 contends and New TBR denies that: (a) the Debtor fully complied with the provisions of the Asset
14 Purchase Agreement and related agreements for the sale of the operating assets with regard to
15 transferring all of the included assets to New TBR and that the Debtor had no obligation to
16 transfer any 800 Numbers to New TBR; (b) New TBR has not complied with the MSA's
17 provisions with regard to chargebacks and has improperly billed the estate for amounts that should
18 have been charged back to the Debtor's customers; (c) New TBR has not complied with its
19 obligations under the MSA to provide information and reports to the representatives of the
20 Debtor's estate upon their request; and (d) the Debtor does not owe the amounts invoiced to it by
21 New TBR.

22 19. The Debtor desires a judicial determination of the respective rights and duties of
23 the Debtor and New TBR with respect to their obligations and rights under the Asset Purchase
24 Agreement and the MSA.

25 20. A judicial determination of the Debtor's and New TBR's respective obligations and
26 rights under the Asset Purchase Agreement and the MSA is necessary and appropriate at this time
27 so that the parties may resolve their disputes and so that they can best mitigate their damages and
28 comply with the agreements.

1 WHEREFORE, the Debtor prays for relief as set forth below.

2 **SECOND CLAIM FOR RELIEF**

3 **(Specific Performance)**

4 21. The Debtor repeats the allegations set forth in Paragraphs 1 through 14 as if fully
5 set forth herein.

6 22. New TBR breached the MSA by failing to comply with its obligations to (a) offset
7 chargebacks against the customers to whom the chargebacks are related; (b) only invoice the
8 Debtor for chargebacks in the event that a customer did not have sufficient proceeds of billing
9 transactions from which to make an offset; and (c) provide the representatives of the Debtor's
10 estate with full and complete information and reports so as to allow them to determine the correct
11 amount of any obligations owed by the Debtor's estate to New TBR. Although demand has been
12 made by the Debtor, New TBR refused (and continues to refuse) to perform, or provide assurances
13 that it will perform, its obligations under the MSA.

14 23. The Debtor has fulfilled all of its obligations under the MSA, except those excused
15 or rendered impractical or impossible by New TBR's breaches described above.

16 24. Enforcing the MSA against New TBR is just and reasonable.

17 25. By reason of New TBR's breaches, the Debtor is entitled to a judicial decree
18 compelling New TBR (1) to offset any chargebacks against the customers to whom the
19 chargebacks relate, (2) only invoice the Debtor in the event that a customer did not have sufficient
20 proceeds of billing transactions from which to make an offset; and (c) provide the representatives
21 of the Debtor's estate with full and complete information and reports so as to allow them to
22 determine the correct amount of any obligations owed by the Debtor's estate to New TBR.

23 26. Pursuant to the terms of the MSA, the Debtor is entitled to recover its reasonable
24 attorneys' fees and expenses incurred in the event of New TBR's breach or to enforce the terms of
25 the MSA. As a result of New TBR's breaches, it has become necessary for the Debtor to employ
26 attorneys to commence and prosecute this action to compel performance of the MSA. The Debtor
27 is entitled to recover from New TBR reasonable attorneys' fees and costs in this action.

28 WHEREFORE, the Debtor prays for relief as set forth below.

1 **THIRD CLAIM FOR RELIEF**

2 **(Breach of Contract and Implied Covenant of Good Faith and Fair Dealing)**

3 27. The Debtor repeats the allegations set forth in Paragraphs 1 through 14 as if fully
4 set forth herein.

5 28. New TBR breached the MSA by failing to comply with its obligations to (a) offset
6 chargebacks against the customers to whom the chargebacks are related; (b) only invoice the
7 Debtor for chargebacks in the event that a customer did not have sufficient proceeds of billing
8 transactions from which to make an offset; and (c) provide the representatives of the Debtor's
9 estate with full and complete information and reports so as to allow them to determine the correct
10 amount of any obligations owed by the Debtor's estate to New TBR. Although demand has been
11 made by the Debtor, New TBR refused (and continues to refuse) to perform, or provide assurances
12 that it will perform, its obligations under the MSA.

13 29. The Asset Purchase Agreement and the MSA each contain as a matter of law an
14 implied covenant that New TBR would act in good faith and provide the Debtor with the benefits
15 of these agreements and not assert that New TBR was entitled to transfers of property or payments
16 that it was not entitled to and that New TBR would provide necessary cooperation, assistance and
17 documentation to satisfy New TBR's obligations under the MSA and permit the Debtor to review
18 that performance so that the Debtor could perform and reap the benefits under the MSA. The
19 implied covenant also requires that New TBR not act in such a way so as to deprive the Debtor of
20 the benefits of the Asset Purchase Agreement and the MSA, including all the services agreed to in
21 the MSA.

22 30. As alleged above, New TBR breached the implied covenant of good faith by failing
23 to deal with the Debtor in a fair and reasonable manner. Instead of adhering to such implied
24 covenant, New TBR asserted ownership of 800 Numbers based on the Asset Purchase Agreement,
25 failed to properly perform services under the MSA and did not provide necessary information and
26 reports to enable the representatives of the Debtor's estate to review and audit New TBR's
27 performance. Such conduct was undertaken by New TBR as part of an effort to extract benefits
28 under the agreements to which New TBR was not entitled.

1 31. The Debtor has fulfilled all of its obligations under the MSA, except those excused
2 or rendered impractical or impossible by New TBR's breaches described above.

3 32. The Debtor has been damaged by New TBR's breaches of the MSA by among
4 other things, losing the ability to offset chargebacks against customers because of New TBR's
5 failure to make these offsets at the time of processing, incurring the expense of seeking recourse
6 against customers for whom chargebacks have been made and not offset, and having to waste
7 resources in attempting to review New TBR's performance of the MSA because New TBR failed
8 to provide the requested information and reports.

9 33. By reason of New TBR's breaches, the Debtor is entitled to damages in an amount
10 to be proven at trial, including without limitation its costs of determining whether New TBR
11 properly performed the agreement, the delay in receiving the benefits promised under the MSA.
12 Pursuant to the terms of the MSA and the Asset Purchase Agreement, the Debtor is also entitled to
13 recover reasonable attorneys' fees and expenses incurred in this action.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, the Debtor prays for relief as follows:

16 1. For the FIRST CLAIM FOR RELIEF that the Court declare that (a) the Debtor
17 fully complied with the provisions of the Asset Purchase Agreement and related agreements
18 for the sale of the operating assets with regard to transferring all of the included assets to New
19 TBR and that the Debtor had no obligation to transfer any 800 Numbers to New TBR; (b) New
20 TBR has not complied with the MSA's provisions with regard to chargebacks and has
21 improperly billed the estate for amounts that should have been charged back to the Debtor's
22 customers; (c) New TBR has not complied with its obligations under the MSA to provide
23 information and reports to the representatives of the Debtor's estate upon their request; and (d)
24 the Debtor does not owe the amounts invoiced to it by New TBR.

25 2. For the SECOND CLAIM FOR RELIEF that the Court enter a judicial decree
26 compelling New TBR (1) to offset any chargebacks against the customers to whom the
27 chargebacks relate, (2) only invoice the Debtor in the event that a customer did not have
28 sufficient proceeds of billing transactions from which to make an offset; and (c) provide the

1 representatives of the Debtor's estate with full and complete information and reports so as to
2 allow them to determine the correct amount of any obligations owed by the Debtor's estate to
3 New TBR.

4 3. For the THIRD CLAIM FOR RELIEF that the Court award damages according
5 to proof.

6 4. On all claims for relief, for costs of suit incurred herein and reasonable
7 attorneys fees; and

8 5. That the Court grant such other and further relief as the Court deems just and
9 proper under the circumstances.

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11 Dated: August 31, 2009

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13 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

14
15 By /s/ Steven B. Sacks
16 MICHAEL H. AHRENS
17 STEVEN B. SACKS
18 Attorneys for Plaintiff and Debtor Old T.B.R.,
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